No. 953

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Supreme Court of the United States

OCTOBER TERM, 1942

PEOPLE OF THE STATE OF ILLINOIS, ex rel. BLANCHE DAVIDSON, CARL C. CRAMER and FRANK W. PHILLIPS,

Petitioners,

vs.

PRESTON BRADLEY, JOHN DILL, OTTO G. BEICH, HARRIETT McINTYRE, CHARLES E. MORRIS, HELEN ROSE PEGELOW, RUSSELL GUIN, LINDELL STURGIS, JACOB E. ALSCHULER, FRANK G. THOMPSON, and JOHN A. WIELAND, Constituting THE TEACHERS COLLEGE BOARD OF THE STATE OF ILLINOIS,

Defendants.

REPLY BRIEF FOR PETITIONERS.

URBAN A. LAVERY,
Attorney for Petitioners.

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PRELIMINARY COMMENT.

In Cardinal Newman's "GRAMMAR OF ASSENT"—a classic treatise on the philosophy of the reasoning processes of the human mind—there appears on the flyleaf a Latin axiom taken from St. Ambrose, which Newman obviously intends as the main thesis of his book. It is indeed a maxim which would not be out of place if it were engraved on the walls of our Courts of Justice, where it could be read and pondered by counsel arguing their cases; for it says:

"Non in dialectica complacuit Deo salvum facere populum suum."

That axiom has a direct cogency for our present discussion; because here, in a single sentence (we submit) there is found a complete reply to the Brief of opposing Counsel filed in this Court. Here, in short, we have high authority for the proposition that dialectics alone are never an adequate answer to a just cause. And nimble dialectics make up the chief portion of Counsels' opposing Brief.

We think this Court will be struck by the fact that the opposing Brief here (like the Opinion of the reviewing Court below), treats this case as if it were an abstract controversy of law, which is somehow to be argued, and considered, and decided *entirely aside from the facts of the case.* Counsel completely ignore (as the reviewing Court ignored, for all practical purposes) the rather shocking series of circumstances and events appearing in the Record, which resulted in the dismissal of the Petitioners as teachers in the DeKalb School. It is a challenging criticism on Counsels' Brief, and yet a true one, to say that it might well have been written in some other case. Such *argument in a vacuum,* when presented in a court of justice, pleases neither God nor man. Certainly, it does little to advance the ends of justice.

But let us pass this point and get to the meat of our Reply Brief.

I.

THE FEDERAL QUESTIONS RAISED.

The first major point made by Counsel is that the Federal Questions here asserted were "not properly raised" below, and therefore have been "forfeited" so far as this Court is concerned. This contention is made on two grounds to which we will advert in their order.

Under this point Counsels' first headnote reads:

> "*First:* **The Respondents very clearly pleaded the statutory construction which the Petitioners now assail as rendering the statute unconstitutional, but the Petitioners did not even intimate any claim that such a construction would render the Act unconstitutional until after the Supreme Court's decision.**"

Four pages of rather labored and involved argument are given in support of that contention. We say in all earnestness that we find it difficult to follow the thread of Counsels' thought on this point. So far as we understand that contention it seems to assert that Petitioners in this Court "assail as unconstitutional" some Statute of Illinois.

Our reply is that we have *never* contended that the basic Statutes involved in this case are "unconstitutional," or even questionable. On the contrary, we have always asserted their validity. It is the *emasculation and destruction* of those statutes by the Reviewing Court below, to which we so strenuously object.

With this comment we will leave this contention of Counsel to the determination of the Court.

Counsels' next headnote under this part of their Brief says:

> "*Second:* **Even if, as the Petitioners contend, the Constitutional question had been 'interjected into the case for the first time by the Opinion of the Supreme Court,' Petitioners would have had an opportunity to raise the Constitutional questions by a proper Petition for Rehearing, prepared in compliance with the applicable Rules of Court. They forfeited this opportunity by filing a petition which did not comply with such rules and which was therefore stricken.**"

Here Counsel admit the right of the Petitioners *in this case* to raise and argue the Federal Questions for the first time by Petition for Rehearing. But Counsel are attempting to *read out of the Record* the entire Petition for Rehearing. Counsel do not dispute the *fact* that the Petition for Rehearing squarely and bluntly raised the two Federal Questions here urged (R. 180-182). They merely argue that our Petition was so "inflammatory" and so "argumentative" that it "forfeited" its right to consideration. We do not believe this Court will accept that contention of Counsel. We particularly call the Court's attention, by way of marginal note, to certain specific facts as shown by the Record.[1]

It appears from the recital of the Reviewing Court's proceedings in the foregoing Note, that the Court itself was rather adept at the business of dialectics. That Court

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[1] A. The Petition for Rehearing was filed with the Reviewing Court on February 15, 1943 (R. 149) and within the time allowed.

B. The Reviewing Court's judgment and Opinion, *for the first time*, interjected into the case the Federal Questions here raised. It was therefore necessary for us to *argue* those questions in our Petition for Rehearing. We could not do otherwise; and we so stated in that Petition. (R. 180-181)

C. Under the practice in Illinois (as probably elsewhere) the Clerk of the Reviewing Court *at once* forwards all Petitions for Rehearing to the homes of the Justices, when the Court is not in session. The members of the Court, therefore, had this Petition for Rehearing before them for about three weeks before the March Term began on March 8th. (R. 188)

D. The Court was thereafter in session at Springfield one full week after the March Term began before it disposed of this Petition for Rehearing. (R. 188) That delay was itself unusual.

E. On March 15, 1943, during the session of the full Court, the following unusual order was entered:

"ORDER

"Now on this day the Court having duly considered the petition for rehearing in the above entitled case, and the Court being fully advised in the premises,

"It is hereby ordered that the said petition for rehearing be and the same is stricken in violation of rules."

F. Thereafter, and also on March 15, 1943, and during the session of the full Court, the following recital appears in the proceedings of the Reviewing Court:

"And afterwards, to wit: upon the striking of the petition for rehearing in violation of rules on March 15, A. D. 1943, the opinion was modified by deleting the fourth paragraph from the end of the opinion, the deleted paragraph being in the words and figures following, to wit:" etc.

shows that it *first* "duly considered" the Petition for Rehearing; the Court then recites that it was "fully advised in the premises"; it then proceeds to *modify its Opinion* in two important respects, as insisted upon in the Petition for Rehearing. Notwithstanding these recitals, the Reviewing Court thereafter ordered the Petition "stricken," without a single word of explanation.

We say, therefore, that there is no sound basis whatever for Counsels' contention that the Federal Questions were not properly raised before the Reviewing Court below. We leave this jurisdictional point without further discussion.[a]

II.

THE MERITS OF THE CASE.

Point II of Counsels' Brief is devoted to what may fairly be called the merits of the case before this Court. Counsels' headnote here reads as follows (Brief, p. 9):

> **"The federal constitutional questions asserted in this petition, even if they had properly been raised in the Courts of Illinois, are not substantial."[b]**

Counsels' entire argument here is a reassertion of a false doctrine which we challenged in the Brief attached

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[a] AS TO "INFLAMMATORY" STATEMENTS, ETC.

Counsel interlard this part of their Brief with charges and innuendoes about the professional character and quality of our Petition for Rehearing. (Brief, pp. 8 and 9) They say that that Petition is "inflammatory"; that it is a "*declamation* upon the evil consequences" of the Opinion below; that it contains "descantations upon the philosophy of education with respect to permanent tenor" (sic). We waive all these charges aside; because we think the Petition for Rehearing will speak for itself. The conclusion of that Petition is particularly condemned because we there cited Bacon's "Essay of Judicature." We pass this charge by, also, with the incidental comment that the great philosopher, who served successively for fourteen years as Solicitor General, Attorney General, and Lord Chancellor of England, hardly needs any defense from us, as a citable authority, particularly when his comment is cited in a case where the Law of Education is the main issue.

[b] It is worth noting that (aside from a long quotation from a reported Illinois case) Counsels' entire argument on the merits takes up only about 5½ pages in their 17-page Brief.

to our Petition filed in this Court (pp. 27-30). Nevertheless Counsel repeat that false view of the law of Illinois by saying:

> "It has been an inveterate principle of the law of Illinois, recognized consistently by the Supreme Court of Illinois since the early days of that Court's history, that in the absence of express statutory authority, contracts employing teachers for longer periods than the school year *have* (sic) are absolutely void as to the period in excess of the School year."

The first point to be noted about that contention of Counsel is that it utterly ignores the fact that the DeKalb School, like all the Teachers Colleges in Illinois, is governed by a special statutory Charter (R. pp. 163 and 170), and is *not* governed by the ordinary "School Law" of the State. Here is a persistent fallacy which constantly appeared in Counsels' Briefs below, and which appears in the Opinion of the Reviewing Court. We repeat that we have clearly shown, in our main Brief in this Court, the falsity of that contention and that strategy.

We will not labor this point further, nor burden the Court with further rebuttal argument on the merits of the case.

III.

A QUESTIONABLE INCIDENT.

Since our Petition in this Court was filed, there has come to our attention an incident which we hereby report to this Court. We have located by chance an original official Opinion of the present Attorney General of Illinois, dated April 27, 1942, which we believe is pertinent here. This Opinion was given just one month before the suit below was filed and before opposing Counsel knew

that this controversy would arise. That Opinion deals also with the law of Teachers Contracts in Illinois. Both implicitly and textually, that Opinion is in direct conflict with the theory and the contentions of the Attorney General of Illinois made in his Brief filed in this Court.[4]

In that Opinion the Attorney General was asked to advise a local School Board on a question which the Opinion itself states as follows:

> "Whether or not the School Board may properly provide in a contract hiring teachers for next year that by mutual consent of the teachers and the School Board, the services of such teachers are to be for a term of one year only, and at the end of the year the contract hiring the teacher shall terminate. . . ?"

The Attorney General answers that question with a definite "No"; and that is the correct answer. But the reasons given are so entirely at variance (as we have said) with Counsel's argument in this Court that we have set out below the comparable subject-matter in parallel columns, where the eye can scan them at a glance.

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[4] Since this Opinion is not yet published we set it out as an appendix to this Brief.

It is worth noting that this Opinion quotes a strong and vigorous and sound statement from 379 Ill. 155 on the rules of statutory construction. We say here with strong emphasis that the rules there laid down are defied and rejected by the Opinion of the Reviewing Court below, and by Counsels' Brief in this Court. If the provisions of the DeKalb School enabling Act as to "hearing" before dismissal of teachers (See our main Petition p. 6) is construed according to the rules in that statement of law, then the Opinion below and the Brief of Counsel in this Court are both untenable on this point.

Language of Attorney General's Opinion.

"From a reading and study of the Teachers' Tenure Act, [Act of 1941; Ill. Rev. Stat. chap. 122, Sec. 136c] it is clear that the intention of the Legislature was to provide qualified, industrious and conscientious school teachers, who have served the probationary statutory period of two years, with security of position, in which they have already demonstrated their ability to fill in an efficient and satisfactory manner. Having attained this security of position, it would be an absurd construction to hold that a school board could take from the teachers this right by requiring another contract which would be good for only one year.

The Act does provide a method for removing an unfit teacher, however. It does eliminate the possibility of a good teacher losing his or her position for personal, trivial, inconsequential, whimsical or political reasons.

I am, therefore, of the opinion that after a teacher completes the two year probationary period and comes under the provisions of said Act no further contract is required of the teacher, and that a contract for one year, as suggested, would be invalid for the reasons herein stated."

Language of Attorney General's Brief.

"It has been an inveterate principle of the law of Illinois, recognized consistently by the Supreme Court of Illinois since the early days of that court's history, that in the absence of express statutory authority, contracts employing teachers for periods longer than the school year have are absolutely void as to the period in excess of the school year." (Brief, p. 10.) . . .

"**It should be particularly noted that the rule that a board may not employ a teacher for more than one year is not based upon any express provision in any statute.** On the contrary, the rule is based upon the **absence** of any provision expressly authorizing one administration so to entail the tenure of teachers as to prevent succeeding administrations from replacing them with other teachers." (Brief, p. 11.) . . .

"**The [school] board has no power to make contracts for the employment of teachers to extend beyond the ensuing school year. . . . A new contract must be made each year with such teachers as it desires to retain in its employ. . . . The board has the absolute right to decline to employ or re-employ any applicant for any reason whatever or for no reason at all.**" (Brief, p. 12.)

We present the foregoing Incident without further comment; since we believe the rule of *res ipsa loquitur* clearly applies to it.

IV.

A CLASSIC CASE ON ACADEMIC TENURE LAW.

It will be remembered that the famous Dartmouth College Case (17 U. S. 518, 4 Wheat. 518) grew out of a set of facts not un-related to the facts in the case at bar. The Trustees of Dartmouth College refused to abide by the original Charter of the College and attempted to depose the President of the College together with certain of the Professors. The Trustees attempted to justify their action by setting up an Act of the New Hamshire Legislature which had authorized such action. The Superior Court of New Hampshire upheld the Trustees. The case came before this Court in 1819, by Writ of Error. John Marshall and his associates reversed the State Court, and upheld the President and the Professors of the College in their contracts with the School.

Since Counsel have challenged our right to have this Court pass upon this case, we think the *Dartmouth College* case is pertinent to our Reply Brief. Reduced to first principles both that case and the case at bar involved impairment of contracts of college teachers. The contracts have merely been impaired in different ways; but a Fedfedal Question is equally involved in both cases.

In his successful argument to the Court, Daniel Webster discussed matters very pertinent to the case at bar when he said in that historic case:

> "The Professors . . . are appointed by the Trustees and are removable by them. Both President and Professors have freeholds in their offices. . . . Nothing could have been less expected in this age, than that there should be an attempt . . . to take away these College livings, the moderate but the only support of literary men who have devoted their lives to the instruction of youth. . . . No description of private property has been regarded as more sacred than College livings. They are the estates and freeholds of a most deserving class of men. . . . Whether to dispossess and oust them; to deprive them of their office,

> and turn them out of their livings: . . . Whether all this be not in the highest degree an indefensible and arbitrary proceeding; is a question of which there would seem but one side fit for a lawyer or a scholar to espouse."

Webster may have made greater orations than his argument in this case; but even that is doubtful. Certain it is, that in all his long career as an Advocate in Court, he never made a *sounder legal argument* than that above quoted. It is an argument that applies forcibly to the case at bar. And with that argument we submit our cause to the Court.

We again urge that the Writ of Certiorari be granted in this case.

Respectfully submitted,

URBAN A. LAVERY,
Attorney for Petitioners.